

# What Federal Contractors Need to Know About the New DEI Contract Clause

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Presented by:

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## Today's Agenda

- What Changed and When
- Who Is Covered
- The FAR Clause
- Records and the Information Collection Request
- The Risk Landscape
- From Risk to Compliance
- What Your Organization Should Do Now

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## Where We Are Today

FAR 52.222-90 is live in all new U.S. performance contracts over \$15,000 as of April 24

Bilateral modification of existing contracts is coming and agencies must “make every effort” by July 24; refusal may lead to termination for convenience

**Enforcement is active!**

First FCA resolution (\$17 million) announced April 10, 2026

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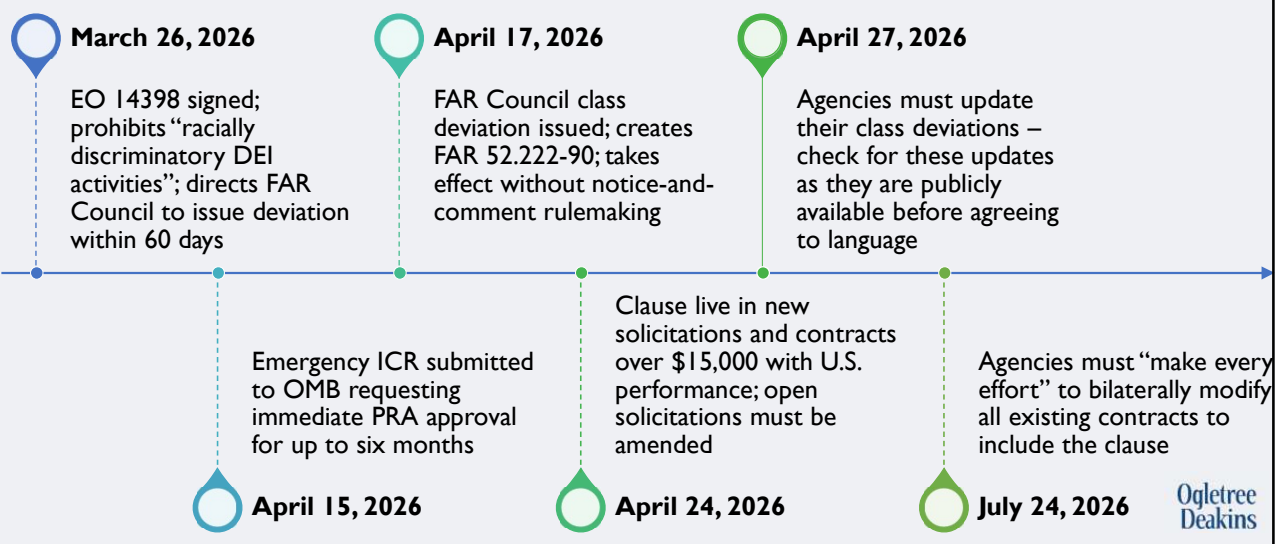
## Framing the Requirement

- Executive Order 14398
- FAR Clause 52.222-90
- Emergency Information Collection Request (ICR)

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## How We Got Here – And Why It Matters Now



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## What This Means for Your Contracts

- ✓ Your new solicitations already include FAR 52.222-90
- ✓ Contracting officers will request bilateral modifications to existing contracts
- ✓ Refusing a bilateral modification may lead to termination for convenience
- ✓ FAR 52.222-90 flows down to subcontractors at all tiers, including commercial products and services
- ✓ The deviation includes a severability provision — partial judicial intervention would not void the entire clause
- ✓ Agencies that adopt the model deviation text without change need not coordinate with the FAR Council
  - ✓ Alternate-language deviations require FAR Council approval

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## Applicability & Scope

### New Solicitations and Contracts (Effective April 24)

- All new solicitations and contracts valued over \$15,000
- Including commercial products and services
- U.S. place of delivery or performance
- Open solicitations must be amended

### Existing Contracts (Deadline – July 24)

- All existing contracts valued over \$15,000
- Including commercial products and services; U.S. performance
- COs “must make every effort to bilaterally modify” by July 24, 2026
- Refusal: CO should consider termination for convenience
- Exception: contracts expiring before December 31, 2026, at CO discretion

### Flow-Down

- Flows down to all subcontracts at any tier, including commercial items, for U.S. performance

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## FAR 52.222-90 Clause Definitions

### Racially discriminatory DEI Activities (§a)

- “disparate treatment based on race or ethnicity in the recruitment, employment (e.g., hiring, promotions), contracting (e.g., vendor agreements), program participation, or allocation or deployment of an entity’s resources.”

### Program participation (§a)

- “membership or participation in, or access or admission to: training, mentoring, or leadership development programs; educational opportunities; clubs; associations; or similar opportunities that are sponsored or established by the contractor or subcontractor.”

### • Key Points:

- “Disparate treatment” – intentional but not defined in EO or tied to discrimination laws
- Prior DEI assessments under different employment discrimination frameworks may not be sufficient

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## What Is – And Is Not – Prohibited

| No Categorical List Exists                                                                                                                                                                                                                                                                                                                                       | Document in Two Streams                                                                                                                                                                                                                                                                                                                       | Engage Counsel Before You Act                                                                                                                                                                                                             | Key Points                                                                                                                                                                                                                                                |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Prohibited or not depends on specific facts, not labels</p> <ul style="list-style-type: none"> <li>• Analysis turns on how the program actually operates in practice</li> <li>• “Disparate treatment” under this clause ≠ disparate treatment under Title VII</li> </ul> <p>Each program requires individualized legal assessment across all five domains</p> | <p>Privileged (counsel directed): DEI assessments, workforce analytics, remediation plans</p> <p>Non-privileged (compliance): Program descriptions, policies, training materials, governance docs</p> <p>Keep both streams audit-ready and version-controlled</p> <p>Assume any submission to a CO will be shared with DOJ, EEOC, and DOL</p> | <p>Do not continue, modify, or discontinue any program without legal review</p> <p>Centralize intake and escalation under counsel to preserve privilege</p> <p>Prepare standardized response packages now not after a request arrives</p> | <p>Rebranding doesn't fix it - substance over labels</p> <p>Overcorrection creates its own legal risk (Title VII/§1981)</p> <p>Prior EEO reviews may not satisfy this clause's framework</p> <p>Treat every program decision as a legal determination</p> |

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## The Six Commitments of 52.222-90(b)

(1) The Contractor will not engage in any racially discriminatory DEI activities.

(2) The Contractor will furnish all information and reports, including providing access to books, records, and accounts, as required by the Contracting Officer, for purposes of ascertaining compliance with this clause.

(3) In the event of the Contractor's or a subcontractor's noncompliance with this clause, this contract may be canceled, terminated, or suspended in whole or in part, and the Contractor or subcontractor may be declared ineligible for further Government contracts.

(4) The Contractor will report any subcontractor's known or reasonably knowable conduct that may violate this clause to the Contracting Officer and take any appropriate remedial actions directed by the Contracting Officer.

(5) The Contractor will inform the Contracting Officer if a subcontractor sues the Contractor and the suit puts at issue, in any way, the validity of this clause.

(6) The Contractor recognizes that compliance with the requirements of this clause are material to the Government's payment decisions for purposes of 31 U.S.C. 3729(b)(4).

(c) The Contractor must include the substance of this clause, including this paragraph (c), in subcontracts at any tier, including those for commercial products and commercial services, for which the place of delivery or performance is in the United States.

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## Highest Exposure Clause Subsections



**Prohibition (b)(1):** The five domains define the boundary of prohibited conduct. Keyed to the EO's own definition and not existing anti-discrimination law. Prior compliance reviews may not be sufficient. Simple, unintentional failure to comply can result in debarment. No requirement for "serious" or "willful" violations.



**Audit Access (b)(2):** Contractually obligated to open books to the CO. No express scope limitations beyond "ascertaining compliance." CO may not be a trained EEO investigator. Submissions must be clear and defensible.



**FCA Materiality (b)(6):** Every invoice under a covered contract is an implicit certification of full compliance. Noncompliance creates potential false claims treble damages, per-claim penalties, qui tam whistleblower actions.

**First FCA resolution:** \$17M settlement announced April 10, 2026.

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## Significant Exposure Clause Subsections



Enforcement + Debarment (b)(3): Noncompliance is an enumerated cause for debarment (FAR 9.406-2(b)(viii)) and suspension (FAR 9.407-2(a)(11)). Transforms single-contract risk into portfolio-wide risk across all current and future federal contracts.



Subcontractor Monitoring (b)(4): Report “known or reasonably knowable” subcontractor conduct that may violate the FAR clause and take CO-directed remedial actions. The 'reasonably knowable' standard goes beyond actual knowledge creating an affirmative diligence obligation for prime contractors over their subcontractor base.



Litigation Notification (b)(5): Notify the CO if a subcontractor sues and the suit puts at issue, in any way, the validity of this clause. Low threshold includes declaratory judgment actions, injunction requests, or counterclaims.

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## Flow-Down: Paragraph (c) and Subcontractor Obligations

### Flow-Down Requirements:

- The contractor shall include the substance of this clause, including this paragraph (c), in subcontracts at any tier in which the subcontractor will perform work in the United States

### Key Points

- No tier limitation
- No separate dollar threshold for flow-down
- Subcontractors assume same six commitments
- Prime bears affirmative duties: monitor, report, remediate, notify CO of litigation

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## The Emergency Information Collection Request (ICR)

### Filed April 15, 2026

- FAR Council submitted emergency ICR to OMB requesting immediate approval for up to six months
- Collection is “essential to the mission of the agencies”

### Before PRA Approval (Now):

- Agencies may require “existing records regarding compliance” in connection with individual investigations
- Includes records requested by EEOC or DOJ as part of an investigation
- Agencies “should expect” contractors to proactively alert COs of potential violations or clause-related lawsuits

### After PRA Approval (Full Enforcement):

- Permanent ICR subject to notice-and-comment process
- Federal Register notice expected

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## What Agencies Can – And Will – Request

- **Agencies Can Already Request:**
  - “Existing records regarding compliance in connection with individual investigations”
  - Records requested by EEOC or DOJ as part of investigations
  - Do not wait for PRA approval because compliance monitoring has already begun
- **OMB Burden Estimates (PRA Supporting Statement):**
  - 34,126 unique prime vendors with qualifying contracts in FY2025
  - 6,825 estimated annual information submissions (including books-and-records requests, subcontractor violation reports, and litigation notifications)
  - 1,365 estimated unique respondents per year
  - 1.167 hours estimated contractor time per response
- **Comparison:**
  - For context, OFCCP historically conducted ~1,000 compliance evaluations per year
  - The PRA estimate covers a broader range of information submissions, not just formal compliance reviews
  - **Note: These are PRA burden estimates, not an enforcement plan but they signal the government is planning for significant compliance activity**

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## Why These Requests Matter

- **WARNING:** Any information submitted to COs may be shared across DOJ, EEOC, DOL; treat as if federal enforcement agencies will see it
- Records may reveal workforce patterns or disparities evaluated using discrimination legal frameworks
- Documentation and analyses not properly protected by attorney-client privilege may become exposed
- Contracting officers initiating requests may not be trained EEO investigators
  - Submissions must be clear, well-organized, and defensible
- Agencies can use AI and publicly available information to identify potential compliance concerns
- Public-facing materials should be consistent with actual practices

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## Enforcement Landscape

### DOJ / False Claims Act

- \$17M settlement is first Civil Rights Fraud Initiative resolution
- FCA enforcement is “the new normal” and multiple additional CIDs reportedly underway
- EO 14398 encourages DOJ to ensure “prompt review” of qui tam complaints related to the clause

### EEOC

- Chair Lucas: “It doesn't matter if you call that DEI or belonging or 'EO' or anything: If it functions like that, it's illegal.”
- Subpoena enforcement actions; affinity group and exclusionary event investigations

### Whole-of-Government Coordination

- EEOC, DOJ, and DOL operating in alignment
- EO requires each agency to annually review its own implementation of the clause and report to the White House
- OMB sector-specific guidance pending and high-risk sectors to be identified
- FCA materiality, debarment, and chain-of-liability risk built into clause structure

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# What Federal Contractors Need to Know About the New DEI Contract Clause

## Triple-Threat Liability Framework



### Contractual Risk

Contract cancellation, termination, or suspension  
Debarment - no requirement for "serious" or "willful" violations  
Suspension, Portfolio-wide consequences.  
Termination for convenience if bilateral modification is refused  
Portfolio-wide consequences



### FCA Risk

Treble damages (3x government harm)  
Per-claim civil penalties (each invoice = separate potential claim)  
Qui tam whistleblower actions (15–30% of recovery)  
EO directs DOJ to ensure prompt review of qui tam actions, to the maximum extent practicable, within 60 days  
\$17M settlement



### Employment Discrimination Risk

Title VII / Section 1981 liability  
EEOC investigations and subpoena enforcement  
DOJ Civil Rights Fraud Initiative  
State AG enforcement activity

**These are cumulative and interconnected!**

**A single compliance failure can cascade through all three simultaneously**

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## Bilateral Modification Response Protocol

### When the CO Contacts You:

- Route request to cross-functional working group
- Confirm clause language matches model deviation verbatim and flag variations
- Confirm privileged DEI assessment complete or underway
- Evaluate: final expiration before Dec 31, 2026? If so, modification may be discretionary
- Do not refuse without deliberate, counsel-advised decision as it could be basis of termination for convenience

### Before You Sign:

- Confirm compliance posture across all five domains
- Verify subcontract templates updated with §(c) flow-down
- Ensure invoice/certification process includes compliance checkpoint

### After You Sign:

- Log modification date and clause version
- Begin tracking: records access, subcontractor monitoring, litigation notification, FCA materiality
- Notify subcontractors and initiate flow-down amendments

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## Compliance Considerations: Short-Term and Ongoing

### Short-Term (Now – July 24, 2026)

- Convene working group with executive sponsor
- Complete privileged DEI assessment across five domains
- Conduct privileged workforce analytics
- Alert procurement teams
- Update subcontract templates with flow-down
- Develop bilateral modification response protocol
- Map contract portfolio (U.S. performance, \$15K)
- Establish invoice/certification compliance checkpoint
- Review public-facing materials

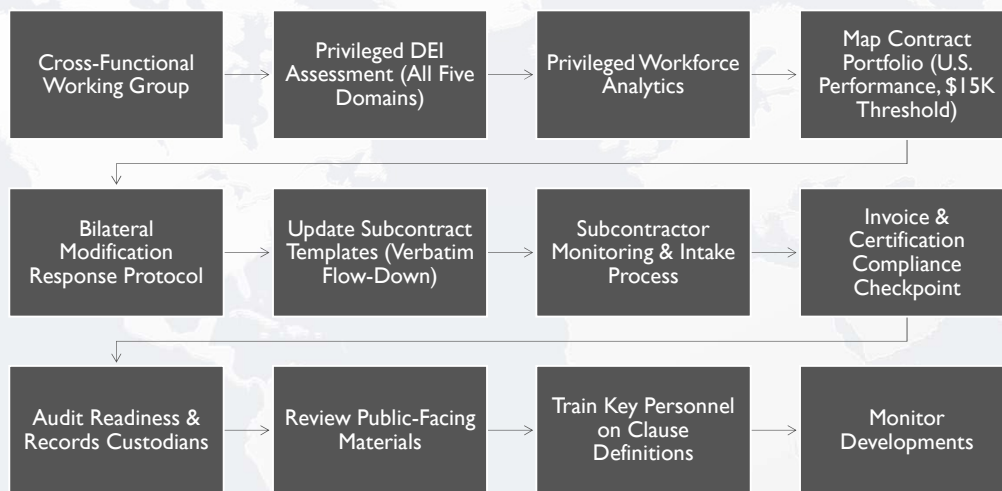
### Ongoing

- Monitor Federal Register for permanent ICR
- Train HR, procurement, compliance on definitions and duties
- Finalize subcontractor monitoring process
- Determine recordkeeping lookback protocols
- Conduct recurring privileged analytics
- Track litigation, sector designations, agency guidance

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## Compliance Considerations: 12 Step Plan



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## Steps to Consider:

### Step 1 – Assemble Cross Functional Working Group

- EO 14398 touches legal, HR, procurement, government contracts, compliance, and finance simultaneously
- Designate an executive sponsor with authority to convene all relevant functions
- Include outside counsel from the outset to preserve privilege
- Meet weekly at minimum through July 24, 2026
- Assign clear ownership by function:
  - Legal: Lead privileged DEI assessment; evaluate FCA exposure; advise on bilateral modifications
  - HR / People Analytics: Conduct privileged workforce analytics; review programs across all five domains
  - Government Contracts / Procurement: Monitor solicitations; prepare bilateral modification protocol; update templates
  - Compliance: Stand up subcontractor monitoring; establish CO notification protocols for (b)(4) and (b)(5)
  - Finance: Build invoice and certification compliance checkpoint

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## Steps to Consider:

### Step 2 – Privileged DEI Assessment

- Lead a clause-specific review across all five domains under attorney-client privilege
- Identify any program, policy, or practice involving race-based criteria
  - Document remediation plans
- Align timing with bilateral modifications – July 24
  - Be ready before acceptance
- Coordinate with Procurement on flow-down updates tied to findings
- Maintain an audit-ready record of determinations under privilege
- **Guard against overcorrection. Eliminating race-neutral programs, particularly privileged analysis, out of an abundance of caution may open different risks.**

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## Steps to Consider: Step 3 – Privileged Workforce Analytics

- Analyze hiring, promotion, pay, and termination outcomes under counsel's direction
- Build standardized, audit-ready data packages now
- Designate custodians; minimize and control access to sensitive data
- Align metrics to likely CO/EEOC/DOJ requests
- Preserve privilege and document analytic decisions

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## Steps to Consider: Step 4 – Map Contract Portfolio

- Identify contracts over \$15,000 with U.S. delivery or performance
  - Include commercial products and services and open solicitations
- Flag contracts expiring by December 31, 2026 (CO discretion)
- Track clause insertion and modification requests
  - Log dates and clause version
- Monitor for agency deviation variations and document differences

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## Steps to Consider: Step 5 – Supply Chain Monitoring

- Insert verbatim paragraph (c) flow-down at any tier for U.S. performance
- Add representations, certifications, notification, and cooperation provisions
- Define what is “reasonably knowable” for each subcontractor relationship
- Stand up intake → investigate → decide → notify → remediate workflow
- Track litigation triggers and notify CO per (b)(5)

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## Steps to Consider: Step 6 – Track Certifications and Invoicing

- Gate invoices on covered contracts through a compliance checkpoint
- Confirm no known or unreported noncompliance before submission
- Align certifications and representations with clause obligations
- Log issues, remediate, and escalate to Legal as needed
- Document approvals in Company contract management system

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## Steps to Consider: Step 7 – Internal Whistleblower Mechanisms

- Publicize confidential reporting channels tied to clause obligations
- Route DEI clause tips into the intake and escalation workflow
- Protect reporters from retaliation
  - Track and document outcomes
- Calibrate for subcontractor issues and the “may violate” threshold
- Account for FCA/qui tam risk in response protocols

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## Steps to Consider: Step 8 – Audit Readiness

- Build standardized, counsel-approved response packages
- Designate custodians
  - Implement data minimization and controls
- Maintain version-controlled policies, training, and governance documentation
- Prepare for significant information request volume (OMB projects ~6,825 annual submissions under the clause)
- Clarify CO request routing and timelines internally

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## Steps to Consider: Step 9 – Review Public-Facing Materials

- Align websites, social media, and public filings with actual practices
- Remove or revise language implying race-based eligibility or reserved opportunities
  - Retain lawful, race-neutral inclusion language; wholesale removal may signal noncompliance with other legal obligations
- Ensure supplier diversity statements avoid race-based conditions
- Conduct review under privilege
  - Coordinate with appropriate internal teams (e.g., Communications, Legal, etc.)
- Refresh periodically as guidance evolves

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## Steps to Consider: Step 10 – Investigation Response Plan

- Establish CO request intake and triage protocol
- Use counsel-directed reviews to preserve privilege
- Define timelines, approvers, and escalation paths
- Anticipate cross-agency sharing (EEOC, DOJ, DOL)
- Track productions and CO communications centrally

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## Steps to Consider: Step 11 – Train Key Personnel

- Train HR on clause definitions and the five domains
- Train Procurement on clause insertion and flow-down mechanics
- Train Compliance on intake, “reasonably knowable,” and CO notification triggers
- Train Finance on invoice-gating and certifications
- Document attendance
  - Incorporate in annual training for key personnel
  - Refresh training through July 24, 2026, or after upon learning more from feds

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## Steps to Consider: Step 12 – Monitor Developments

- Track permanent ICR rulemaking and comment opportunities
- Watch OMB sector-specific designations and guidance
- Monitor litigation (e.g., *NADOHE v. Trump*)
- Review agency-specific deviation variations
- Schedule quarterly cross-functional compliance reviews

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## Looking Ahead

- Permanent ICR rulemaking
- OMB sector designations
- Agency annual reviews (by July 24 and annually)
- Litigation challenging EO 14398
- Additional FCA resolutions and accelerated qui tam review
- Possible certification requirement via SAM.gov
- Agency specific deviation variations (unlikely but possible)

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## Resources

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## Government Agency Resources

- EEOC Newsroom – [www.eeoc.gov/newsroom](http://www.eeoc.gov/newsroom)
- EEOC Technical Assistance: "What To Do If You Experience Discrimination Related to DEI at Work" – [www.eeoc.gov/what-do-if-you-experience-discrimination-related-dei-work](http://www.eeoc.gov/what-do-if-you-experience-discrimination-related-dei-work)
- EEOC Technical Assistance: "What You Should Know About DEI-Related Discrimination at Work" – [www.eeoc.gov/wysk/what-you-should-know-about-dei-related-discrimination-work](http://www.eeoc.gov/wysk/what-you-should-know-about-dei-related-discrimination-work)
- DOJ Civil Division Enforcement Priorities (June 2025) – [www.justice.gov/civil/media/1404046/dl](http://www.justice.gov/civil/media/1404046/dl)
- Attorney General Bondi Memo to Federal Agencies (July 2025) – [www.justice.gov/ag/media/1409486/dl](http://www.justice.gov/ag/media/1409486/dl)
- FAR Council Deviation and Model Clause — available through agency RFO class deviation postings on Acquisition.gov
- OMB Information Collection Request materials - forthcoming

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## Other Resources

- Executive Orders & Fact Sheets
  - EO 14173: "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" (Jan. 2025) – [www.whitehouse.gov/presidential-actions](http://www.whitehouse.gov/presidential-actions)
  - EO 14398: "Addressing DEI Discrimination by Federal Contractors" (Mar. 2026) – [www.whitehouse.gov/presidential-actions](http://www.whitehouse.gov/presidential-actions)
  - White House Fact Sheet on EO 14398 (Mar. 2026) – [www.whitehouse.gov/fact-sheets](http://www.whitehouse.gov/fact-sheets)
- State Attorney General Opinions
  - Texas Attorney General Opinion on DEI (Jan. 2026) – [www.texasattorneygeneral.gov](http://www.texasattorneygeneral.gov)
  - Florida Attorney General Opinion on DEI (Jan. 2026) - [www.myfloridalegal.com/node/28132](http://www.myfloridalegal.com/node/28132)
- Litigation Trackers
  - NYU Meltzer Center "Advancing DEI" Case Tracker - <https://advancingdei.meltzercenter.org/cases/>

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## Upcoming Programs

### [2026 National Workplace Strategies Seminar](#) (May 13-15, 2026)

- Key Policymaker Perspective: A View from the EEOC Chair Andrea Lucas
- FAR Overhaul
- EEOC Enforcement – Cases, Trends and Priorities
- EEOC “Insiders” Answer Employers’ Burning Questions
- Training Lessons and Guardrails in the New Normal
- Recruiting and Hiring – Lawful and Inclusive Practices for Getting the Best Talent
- Lawful DEI Programming Roundtable

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## Thank you!

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